UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAMION NATHANIEL BROMFIELD, Petitioner, v. A. NEIL CLARK, et al., Respondents.	CASE NO. C06-0757-JCC REPORT AND RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Damion Nathaniel Bromfield is a native and citizen of Jamaica who is currently in the custody of the U.S. Immigration and Customs Enforcement ("ICE"). On May 31, 2006, he filed, pro se, a Petition for Writ of Habeas Corpus under 8 U.S.C. § 2241, which challenges the lawfulness of his continued detention without bond pursuant to the mandatory detention provision of the Immigration and Nationality Act ("INA"), INA § 236(c), 8 U.S.C. § 1226(c). (Dkt. #6). Respondents have moved to dismiss, arguing that petitioner is lawfully detained *not* under INA § 236(c), but under INA § 241(a)(1)(C), which allows for continued detention at the discretion of the Attorney General after an administratively final order of removal. (Dkt. #16).

Alternatively, respondents contend that even if INA § 236 governs, petitioner is not eligible for release because his detention is mandatory under INA § 236(c).

Having carefully reviewed the entire record, I recommend that petitioner's habeas petition (Dkt. #6) be GRANTED and that respondents' cross-motion to dismiss (Dkt. #16) be DENIED.

II. BACKGROUND AND PROCEDURAL HISTORY

Petitioner is a native and citizen of Jamaica. (Dkt. #18 at L3, L6). On September 3, 1993, he was admitted to the United States at Miami, Florida, as a Lawful Permanent Resident ("LPR"). (Dkt. #18 at L13).

On June 21, 2004, petitioner was convicted in the Circuit Court of the State of Oregon for the County of Washington for the offense of Sexual Abuse in the Third Degree in violation of Oregon Revised Statute ("ORS") 163.415, Contributing to the Sexual Delinquency of a Minor in violation of ORS 163.435, and Theft in the First Degree in violation of ORS 164.055. (Dkt. #18 at L62-65).

On February 8, 2005, ICE issued a Notice to Appear, placing petitioner in removal proceedings and charging petitioner as removable under INA § 237(a)(2)(A)(iii), for having been convicted of an aggravated felony as defined by INA § 101(a)(43)(A), relating to sexual abuse of a minor. (Dkt. #18 at L17-18). On February 9, 2005, petitioner filed an Application for Asylum and for Withholding of Removal, claiming that he feared persecution if forced to return to Jamaica on account of his sexual orientation. (Dkt. #18 at L166-191).

At the individual hearing on April 5, 2005, the Immigration Judge ("IJ") denied petitioner's applications for relief and ordered him removed. (Dkt. #18 at L300-305). Petitioner timely appealed the IJ's decision to the Board of Immigration Appeals ("BIA"). On September 15, 2005,

the BIA affirmed the IJ's decision and dismissed petitioner's appeal. (Dkt. #18 at L350-51). On October 12, 2005, petitioner filed a Petition for Review and a Motion for Stay of Removal with the Ninth Circuit Court of Appeals. (Dkt. #18 at L345-49, L-335-36). The Ninth Circuit subsequently entered a temporary stay of removal pendente lite. (Dkt. #18 at R121-122). Petitioner's petition remains pending in the Ninth Circuit.

On February 8, 2006, petitioner was taken into custody by ICE at the Multnomah County Probation Office, and was subsequently transferred to the Northwest Detention Center in Tacoma, Washington. (Dkt. #18 at R84-85). On or about February 1, 2006, ICE conducted a custody review of petitioner's case. (Dkt. #18 at R104-111). By letter dated February 9, 2006, ICE Field Office Director A. Neil Clark declined to release petitioner, stating that, "pursuant to the authority contained in section 236 and 241 of the Immigration and Nationality Act, and parts 236 and 241 of the Code of Federal Regulations, I have determined that you shall continue to be detained in the custody of ICE pending the result of your appeal before the Ninth Circuit Court of Appeals." (Dkt. #18 at R113).

On May 31, 2006, petitioner filed the instant habeas petition. (Dkt. #6). On July 10, 2006, respondents filed a Return and Cross-Motion to Dismiss. (Dkt. #16). Petitioner filed his response on July 21, 2006. (Dkt. #19). Respondents filed their reply on August 4, 2006. (Dkt. #20). The petition and cross-motion to dismiss are now ready for review.[1]

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[1] The Court notes that respondents originally submitted that the petitioner's habeas petition should be dismissed because the petition is not a "short plain statement" of petitioner's claim because it seems to argue the facts of someone else's case, and it is 88 pages long. (Dkt. #16 at 4-5). Petitioner's response to respondents' motion to dismiss, however, provides more details of his own case and is significantly shorter. (Dkt. #19). Accordingly, respondents do not contest that petitioner has now satisfied the objectives of Federal Rule of Civil Procedure 8, as applied to

III. DISCUSSION

A. Detention Provisions

Respondents argue that once an administratively final order of removal has been entered, detention shifts from INA § 236, 8 U.S.C. § 1226, to INA § 241(a), 8 U.S.C. § 1231(a). (Dkt. #16 at 6). Respondents contend that petitioner's order of removal became administratively final in this case upon the BIA's denial of his appeal, and thus petitioner is detained pursuant to Section 241. *Id.*

INA § 236 provides the framework for the arrest, detention, and release of aliens in removal proceedings. INA § 236, 8 U.S.C. § 1226. Once removal proceedings have been completed, detention and release of the alien shifts to INA § 241, 8 U.S.C. § 1231. The determination of when an alien becomes subject to detention under Section 241 rather than Section 236 is governed by Section 241(a)(1). Section 241(a)(1)(B) provides:

> The removal period begins on the *latest* of the following:
>
> (i) The date the order of removal becomes administratively final.
>
> (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.
>
> (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

8 U.S.C. § 1231(a)(1)(B)(emphasis added). Accordingly, pursuant to Section 241(a)(1)(B)(ii), where a court issues a stay of removal pending its review of an administrative removal order, the alien continues to be detained under Section 236 until the court renders its decision. *See*

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pro se petitioners. (Dkt. #20 at 2).

Quezada-Bucio v. Ridge, 317 F. Supp. 2d 1221, 1224 (W.D. Wash. 2004)(holding that the "removal period" begins on the latest of the following: the date the order of removal becomes administratively final, or, if the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.); *see also Wang v. Ashcroft*, 320 F.3d 130, 147 (2d Cir. 2003); *Clavis v. Ashcroft*, 281 F. Supp. 2d 490, 493 (E.D.N.Y. 2003)("Because the Court entered a temporary stay of deportation, up to this point petitioner has remained in INS custody pursuant to Section 236."); *Milbin v. Ashcroft*, 293 F. Supp. 2d 158, 161 (D. Conn. 2003)("Until this decision is filed, Milbin continues to be subject to mandatory detention under § 236(c), as this Court's stay order . . . remains in effect."). Here, the Ninth Circuit has issued a stay of removal pending its review of petitioner's administrative removal order. "Because Petitioner's removal order has been stayed by the Ninth Circuit pending its review of the BIA decision, the 'removal period' has not yet commenced, and Petitioner therefore is detained pursuant to INA § 236." *Quezada-Bucio*, 317 F. Supp 2d at 1224.

B. Mandatory Detention

Alternatively, respondents argue that even if petitioner's detention is governed by INA § 236, he is properly detained pursuant to the mandatory detention provision found in Section 236(c)(1)(B) because petitioner was convicted of an aggravated felony. (Dkt. #16 at 11). That statute states, in part, as follows:

> The Attorney General shall take into custody any alien who . . .
>
> (B) is deportable by reason of having committed any offense covered in section 237(a)(2)
> . . .
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the

alien may be arrested or imprisoned again for the same offense.

INA § 236(c)(1), 8 U.S.C. § 1226(c)(1) (emphasis added). Petitioner argues that he is not subject to mandatory detention under INA § 236(c) because he was not taken into immigration custody immediately upon his release from state custody as required by the express language of the statute.[2] (Dkt. #6 at 15-18; Dkt. #19 at 16). In support of his argument, petitioner cites two decisions from this Court which found that, under the plain meaning of the statute, mandatory detention does not apply to criminal aliens if they are not taken into immigration custody immediately after being released from state custody. *See Quezada-Bucio,* 317 F. Supp. 2d at 1228; *Pastor-Camarena v. Smith*, 977 F. Supp. 1415 (W.D. Wash. 1997).

Respondents argue that the Court's decisions in *Quezada-Bucio* and *Pastor-Camarena* were wrongly decided, and that the Court should not follow them. Respondents argue that the BIA has rejected the interpretation of Section 236(c) that petitioner advances here, finding instead that Section 236(c) applies to criminal aliens, such as petitioner, who were released from incarceration before being taken into ICE custody. *In re Padilla-Vargas*, 2004 WL 2943509 (BIA 2004); *In re Rojas*, 23 I & N Dec. 117, 125 (BIA 2001); *In re Nobles*, 21 I & N Dec. 672 (BIA 1997). Respondents contend that this Court should give deference to the BIA decisions. (Dkt. #16 at 11-12). The Court disagrees with respondents.

The phrase "when the alien is released" has been the subject of statutory interpretation in several previous cases, including two published decisions by this Court. *See Quezada-Bucio,* 317

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[2] Although petitioner cites the facts of someone else's case, it appears from the administrative record that petitioner was detained sometime after his release from state custody. (Dkt. #18 at R84-85).

F. Supp. 2d at 1228; *Pastor-Camarena v. Smith*, 977 F. Supp. at 1415; *see also Boonkue v. Ridge*, 2004 WL 1146525 (D. Or. 2004); *Alikhani v. Fasano,* 70 F. Supp. 2d 1124 (S.D. Cal. 1999); *Alwady v. Beebe,* 43 F. Supp. 2d 1130 (D. Or. 1999); *Velasquez v. Reno,* 37 F. Supp. 2d 663 (D.N.J. 1999); *Tenrreiro v. Ashcroft*, 2004 WL 1354277, *vacated and transferred*, 2004 WL 1588217 (D. Or. 2004). In *Quezada-Bucio*, this Court determined that "the mandatory detention statute, INA § 236(c), does not apply to aliens who have been taken into immigration custody several months or several years after they have been released from state custody." *Quezada-Bucio*, 317 F. Supp. 2d at 1231 (finding that petitioner who was released from state custody and was not taken into immigration custody until three years later was not subject to mandatory detention under INA § 236(c)); *see also Pastor-Camarena*, 977 F. Supp. at 1417 (holding that the plain meaning of the statute indicates that INA § 236(c) applies to aliens immediately after release from custody, and not to aliens released many years earlier). As the Court previously explained,

> 'the clear language of the statute indicates that the mandatory detention of aliens 'when' they are released requires that they be detained at the time of release. *Alikhani*, 70 F. Supp. 2d at 1130. . . . [I]f Congress had intended for mandatory detention to apply to aliens at any time after they were released, it could easily have used the language ' *after* the alien is released," 'regardless of when the alien is released,' or other words to that effect. Instead Congress chose to use the word 'when,' which connotes a much different meaning.

Quezada-Bucio, 317 F. Supp. 2d at 1230. The Court finds, as in *Quezada-Bucio*, that Congress intended mandatory detention to apply only to those aliens taken into immigration custody immediately after their release from state custody. *Id.*

The Court also disagrees with respondents that the BIA's decision in *In re Rojas*, 23 I & N Dec. 117 (BIA 2001), and its progeny should be accorded deference. The United States

Supreme Court has held that the federal courts should defer to an agency decision only if the statute, "applying the normal 'tools of statutory construction,' [is] ambiguous." *INS v. St. Cyr*, 533 U.S. 289, 320 n.45, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)(citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)). As determined above, the plain language of Section 236(c) is not ambiguous.

Accordingly, the Court agrees with petitioner that mandatory detention is not authorized in petitioner's case by Section 236(c) because he was not taken into immigration custody when he was released from state custody as required by the express language of the statute. *Quezada-Bucio*, 317 F. Supp. 2d at 1231; *Pastor-Camarena*, 977 F. Supp. at 1417. The Court also agrees that petitioner is entitled to an individualized bond hearing pursuant to the general release terms of INA § 236(a).

IV. CONCLUSION

For the foregoing reasons, I recommend that petitioner's habeas petition be GRANTED, and that respondents' cross-motion to dismiss be DENIED. A proposed Order accompanies this Report and Recommendation.

DATED this 16th day of October, 2006.

Mary Alice Theiler
United States Magistrate Judge